Appropriation Art and Fair Use

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I. INTRODUCTION

The current system to determine a fair use through litigation is ineffective as applied to conflicts involving visual arts[1] because the courts have misused the fair use doctrine.[2] The first problem is that inconsistent case law regarding fair use and copyright infringement fails to provide guidance for artists.[3] The second problem is that the judicial concept of copyright infringement does not comport with the accepted norms in the art world; artists historically have borrowed and copied existing expression without objection or conflict.[4] An example of how artists borrow from each other is most evident in an artistic movement called appropriation art.[5]

Conflicts involving visual arts need to be resolved through a new approach that would dispel the uncertainty of whether a secondary use is a fair infringement of a copyright holder's exclusive rights.[6] A delicate balance needs to be struck between, on the one hand, preventing "piracy"[7] of artwork for pure financial gain where there is no introduction of original expression,

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[1] I am limiting the term "visual arts" to refer to paintings, sculpture, drawings, prints, and compilations of these mentioned.

[2] Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090 (2007).

[3] Heather J. Meeker, *The Ineluctable Modality of the Visible: Fair Use and Fine Arts in the Post-Modern Era*, 10 U. MIAMI ENT. & SPORTS L. REV. 195, 212 (1993).

[4] JEAN LIPMAN & RICHARD MARSHALL, ART ABOUT ART 6–7(1978); *see also* Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 495 (2007).

[5] ArtLex Dictionary defines appropriation as "[t]o take possession of another's imagery (or sounds), often without permission, reusing it in a context which differs from its original context, most often in order to examine issues concerning originality or to reveal meaning not previously seen in the original." ArtLex Art Dictionary, http://www.artlex.com/ArtLex/a/appropriation.html (last visited Jan. 24, 2010).

[6] *See generally* Meeker, *supra* note 3.

[7] Rogers v. Koons, 960 F.2d 301, 311 (2d Cir. 1992).

and on the other hand, encouraging the production of new and innovative artwork that reflects current cultural ideas and attitudes.[8]

This article proposes a potential solution to the fair use debacle involving visual arts: Using the Uniform Domain Name Dispute Resolution Policy (UDRP) as a guidepost, artists may register their works with the U.S. Copyright Office and thereby agree to mandatory arbitration with a panel of art experts to resolve any potential conflicts involving fair use.[9] The experts' decisions would reflect industry standards and practices, while also balancing the parties' interests to be protected from copyright infringement, thereby establishing a consistent body of awards.[10]

Part II of this article describes the problems with judicial interpretation of fair use in general and explains why the current judicial application of the fair use doctrine does not work for the medium of visual arts. Part III discusses case law addressing fair use and fine art and highlights the inconsistencies in the case law. Part IV explains the system used by the UDRP and how it would prove to be a useful model for fair use disputes in the visual arts. Finally, closing remarks are found in Part V.

II. PROBLEMS WITH FAIR USE IN THE REALM OF THE VISUAL ARTS

A. *The Current State of the Fair Use Doctrine*

Copyright law exists to foster creative expression and dissemination of ideas.[11] A plaintiff may prove that another party infringed their copyright if they establish that they have ownership of the rights at issue and that the party infringed those rights.[12] The courts inquire whether the defendant's work evidences copying of the plaintiff's work, and if so, whether such copying amounts to an improper appropriation of the copyrighted matter.[13]

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[8] Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 80 (1996); *see also* Meeker, *supra* note 3, at 211. These new works may sometimes use another's work in whole or in part in the creation of the secondary work. E. Kenly Ames, Note, *Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473, 1479–80 (1993).

[9] WIPO ARBITRATION AND MEDIATION CENTER, GUIDE TO WIPO DOMAIN NAME DISPUTE RESOLUTION (2003).

[10] Arewa, *supra* note 4, at 486–87.

[11] Meeker, *supra* note 3, at 196.

[12] CRAIG JOYCE ET AL., COPYRIGHT LAW 616 (7th ed. 2006).

[13] *Id.*

An exception to copyright infringement is the fair use defense. Courts analyze four factors when determining whether a use is fair:[14] (1) "the purpose and character of the use,"[15] which includes whether the new work is transformative or merely supersedes the original;[16] (2) "the nature of the copyrighted work;"[17] (3) "the amount and substantiality of the portion used in relation to the copyrighted work as a whole;"[18] and (4) "the effect of the use upon the potential market for or value of the copyrighted work."[19] The fair use defense provides a "'privilege in others than the owner of the copyright . . . to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner of the copyright.'"[20] However, over time the fair use doctrine became known as the "'most troublesome in the whole of copyright.'"[21]

Michael Carroll and Thomas Cotter argue that judicial application of the statutory fair use factors is too difficult to understand and needs to be altered in order to exist as an effective guidepost for users.[22] Michael Madison argues the real problem with fair use is the "emptiness"[23] of 17 U.S.C. § 107, meaning that the fair use factors do not give any real direction, but instead allow parties to make any number of arguments.[24] Carroll states that the four

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[14] The four fair use factors were originally made judicially and were later codified under 17 U.S.C. § 107 in 1976. The seminal case in which the Supreme Court analyzed and applied the four fair use factors was *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

[15] 17 U.S.C. § 107(1) (2006).

[16] *Campbell*, 510 U.S. at 579.

[17] 17 U.S.C. § 107(2) (2006).

[18] *Id.* § 107(3).

[19] *Id.* § 107(4).

[20] JOYCE ET AL., *supra* note 12, at 776 (quoting H. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)).

[21] Meeker, *supra* note 3, at 201 (quoting Dillar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939)).

[22] Carroll, *supra* note 2, at 1088; *see also* Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271, 1271 (2008).

[23] Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 396 (2005).

[24] *Id.* Madison states:

> [T]he statute itself has become not the embodiment of copyright's blended nature . . . but a placeholder for all manner of arguments about limits, many of which have little to [do] either with "productivity" or "personal use" without doing much at all to help courts, lawyers, litigants, and plain old ordinary folk reason their way to solutions. It's what prompted Professor Lessig to characterize fair use as 'the right to hire a lawyer' and it's the problem of the supplicant who crawls his way to

factors do not help analyze the conflicts, but rather "serve as convenient pages on which to hang antecedent conclusions."[25] As a result, fair use has been used when it should not have been.[26] Since the doctrine is used by courts as "a case-by-case 'safety valve' for a variety of policy, fairness, and/or personal autonomy concerns," the doctrine has lost its original usefulness to protect certain uses consistently.[27]

David Nimmer argues that courts first make a subjective judgment as to whether a use has been fair and then later align the four factors to fit their decision.[28] As a result, a user does not know what is fair until a judge decides it is fair.[29] More alarming is the inconsistency in the law shows what may be a fair use for one artist is unfair for another.[30]

There is uncertainty in the case law because the holdings are too case specific;[31] the case law has not established with any certainty when a use is fair beyond that particular case. It is this lack of consistency that has muddled the doctrine.[32] While the goal of the fair use doctrine may have

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> the top of the mountain to seek wisdom and spiritual guidance from the seer and who asks, above all else, 'what is fair use?' Fair use has become too many things to too many people to be of much specific value to anyone.

Id. at 396-97.

[25] Carroll, *supra* note 2, at 1095.

[26] Madison, *supra* note 23, at 397.

[27] *Id.* at 406–07.

[28] David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66-SPG LAW & CONTEMP. PROBS. 263, 281 (2003).

[29] Sherri L. Burr, *Artistic Parody: A Theoretical Construct*, 14 CARDOZO ARTS & ENT. L.J. 65, 67 (1996).

[30] *Id.* Burr stated that "the application of the fair use doctrine can be inconsistent, unpredictable, and incoherent."; *see also* Meeker, *supra* note 3, at 211. Meeker notes:

> It is difficult to foresee where a court will draw the line between infringement and fair use. This difficulty is exacerbated by the tendency of courts to require full trials on the merits of the fair use defense. "Fair use does not assist parties, or industries, in making ex ante determination whether or not to copy, and if so, how much."

Id. at 212 (quoting Jane Ginsberg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1926 (1990)).

[31] Carroll, *supra* note 2, at 1090. "While the doctrine's attention to context has many salutary attributes, it is so case-specific that it offers precious little guidance about its scope to artists, educators, journalists, Internet users, and others who require use of another's copyrighted expression in order to communicate effectively." *Id.*

[32] *Id.* at 1105–06.

been to protect some uses in order "[t]o Promote the Progress of Science and the useful Arts,"[33] in reality fair use further stifles creativity.[34]

B. *Fair Use and the Visual Arts*

While uncertainty associated with judicial application of the fair use doctrine is problematic across the board, the problem is particularly dire as the courts attempt to apply fair use to cases involving visual arts.[35] Artists, as potential fair users who want to incorporate another's work, are deterred from engaging in a desired use because of the uncertainty associated with the fair use doctrine.[36] When an artist fears litigation, and therefore does not create art, the goals of copyright to promote creation are not fostered.[37] In addition to fear of uncertainty, there are large costs associated with litigation and potential damages, which also deter artists from creating art for fear of subjecting themselves to litigation.[38]

There are two reasons why the current judicial application of the fair use doctrine is not suitable to resolve disputes involving fine art. First, the visual arts, and appropriation art in particular, are ill-suited to the judicial notion of fair use because what the courts characterize as "infringement" is inherently part of the creative process.[39] Second, courts have failed to recognize that all art is derivative, particularly in the realm of appropriation art, unlike other media to which the fair use doctrine applies.[40]

1. *Appropriation Art*

Appropriation art does not lend itself to fair use protection under the current state of the law.[41] Appropriation art is not a new movement; artists

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[33] U.S. CONST. art. I, § 8, cl. 8.

[34] Madison, *supra* note 23, at 393. This is discussed in further detail *infra* Part IIB.

[35] Ames, *supra* note 8, at 1475–76.

[36] Carroll, *supra* note 2, at 1096.

[37] Ames, *supra* note 8, at 1475–76.

[38] Carroll, *supra* note 2, at 1096.

[39] William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 1 (2000).

[40] Yonover, *supra* note 8, at 80.

[41] Elizabeth H. Wang, *(Re)Productive Rights: Copyright and the Postmodern Artist*, 14 COLUM.-VLA J.L. & ARTS 261, 262 (1990).

have been borrowing from each other for centuries.[42] An example of appropriation art is Pablo Picasso's use of Diego Velazquez's *Las Meninas* in his *Maids of Honour*:

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William Landes explains appropriation art as a movement that:

> [B]orrows images from popular culture, advertising, the mass media, other artists and elsewhere, and incorporates them into new works of art. Often, the artist's technical skills are less important than his conceptual ability to place images in different settings and, thereby, change their meaning. Appropriation art has been commonly described 'as getting the hand out of art and putting the brain in.'[44]

Patricia King said of appropriation art:

> [T]he artist appropriates the exact *expression* of an idea; he has adapted it, however, changing its character in the context of an independent artistic creation. The artist incorporates the appropriated work into a separate expressive form that is dependent upon, but not limited by, its past mode of expression. The resulting product is not a mere copy which we may

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[42] To clearly illustrate my points, I am including examples of artwork throughout this article to show the reader both how artists transform each other's work, as well as to provide visuals to accompany the case summaries.

[43] Diego Velazquez, *Las Meninas*, 1656, oil on canvas, Museo del Prado, Madrid, Spain. Pablo Picasso, *The Maids of Honour (Las Meninas)*, after Velazquez, 1957, oil on canvas, Museu Picasso de Barcelona, Spain. Here, the viewer can see how Picasso used Velazquez's painting and transformed it into a cubist rendition of the same scene.

[44] Landes, *supra* note 39, at 1.

> legitimately prohibit, but an entirely new expression which the law should serve to protect.[45]

Appropriation artists do not hide the fact that they borrowed images from others.[46] In fact, artists challenge the viewer to discover the "genesis" of their work.[47] The artist removed the original work from its original context and by doing so tries to force the viewer to see the image differently; they transformed the original work.[48]

Transformation is one of the elements courts consider when determining whether the use was fair.[49] A use may be fair if the second artist's work does not merely supersede the original work, but instead "adds something new, with a further purpose or different character, altering the first with new expression, meaning or message."[50] The goal of copyright to promote the progress of the arts is furthered by the creation of transformative works.[51] Copyright law does not exist in this country to reward the labor of the artist, but instead assures the artist that their original expression will be protected, while at the same time encourages others to build upon that artist's ideas by transforming that original expression into something new.[52]

By forcing the viewer to see something new in something old and commonplace, the appropriation artist transforms the original work into art with a new "expression, meaning [and] message."[53] Appropriation artists often use images that are easily recognizable as parts of popular culture.[54] This aids the viewer in being able to take part in a dialogue and respond to the secondary work.[55] Viewer response to appropriation art is critical in illustrating that the latter use is transformative.[56] If the viewer perceives that the second work signifies something different from the first, the artist succeeded in transforming the original work's meaning into something new

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[45] Patricia Krieg, *Copyright, Free Speech, and the Visual Arts*, 93 YALE L.J. 1565, 1571 (1984).

[46] LIPMAN & MARSHALL, *supra* note 4, at 7.

[47] *Id.*

[48] Ames, *supra* note 8, at 1482.

[49] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

[50] *Id.*

[51] Arewa, *supra* note 4, at 544 (citing *Campbell*, 510 U.S.).

[52] *Id.*

[53] *Campbell*, 510 U.S. at 579.

[54] Ames, *supra* note 8, at 1482.

[55] Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 458–59 (2008).

[56] *Id.*

and original.[57] Further, in the process of creating appropriation art, which uses another's work as a keystone, the appropriation artist challenges "ideas about ownership and originality."[58]

While an appropriation artist uses another's work as a base, their creative input comes through the transformative nature of their use.[59] What is valued is the appropriation artist's conceptual ability to look beyond obvious visual cues and provide social commentary.[60] "The secondary artist's creative input is her ability to 'see' that image in ways the average observer does not and to recognize, whether or not the image is well-known, its potential as a focal point for social criticism."[61] It is the appropriation artist's ability to re-frame an original work both physically and metaphysically to create a discursive community, which is deemed original and valued in this movement.[62]

Appropriation art often involves more copying—often copying of the entire original work—which is not typically protected by copyright law.[63] However, there is no difference between the practices of appropriation art and the derivative nature of all art movements.[64] If copyright law prevents artists from using another's work in their own creation, the benefits of appropriation art—which include intellectual stimulation—will be stripped from the public realm.[65] Moreover, the appropriation artist will be left vulnerable to an infringement lawsuit.[66] Disallowing production of

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[57] *Id.* at 455.

[58] Ames, *supra* note 8, at 1482.

[59] *Id.* at 1482–83.

[60] *Id.* at 1482.

[61] *Id.*

[62] Heymann, *supra* note 55, at 458.

[63] MARTHA BUSKIRK, THE CONTINGENT OBJECT OF CONTEMPORARY ART 90 (2003); *see also* Meeker, *supra* note 3, at 208. Meeker suggests that courts should not consider how much of the original artwork an artist uses when conducting a fair use analysis. Whether an artist only uses a small part of an original work or incorporates an entire image into their work would be irrelevant. Further, case law will protect works that parody if they attack the heart of the original work and take no more than necessary to accomplish its goals. Campbell v. Acuff-Rose Music, Inc. 510 U.S. 569, 589 (1994). However, appropriation art is not necessarily parody, so it is not always protected. Michael A. Einhorn, *Miss Scarlett's License Done Gone!: Parody, Satire, and Markets*, 20 CARDOZO ARTS & ENT. L.J. 589, 601 (2002).

[64] Michael Spence, *Rogers v. Koons: Copyright and the Problem of Artistic Appropriation*, *in* THE TRIALS OF ART 213, 213 (Daniel McClean ed., 2007).

[65] Krieg, *supra* note 45, at 1568.

[66] *Id.*

appropriation art will also promote the idea that "property interests supersede society's right of access to ideas and information."[67]

Because of the restrictions that copyright law places on the creation of art, there exists a fear about the continuance of appropriation art, and art in general.[68] There are a number of reasons why courts are not tolerant of appropriation art.[69] First, copyright law has become more relevant in the average American's daily life.[70] Second, this growing relevance has led to a growing awareness of copyright issues.[71] Finally, these two facts have "magnified" the disparity between copyright case law and art norms.[72] This disparity indicates the need for reform in order to recalibrate how decisionmakers approach disputes involving the visual arts so that the holdings reflect industry standards and practices.[73] Sherrie Levine, a prominent contemporary artist, commented on the difficulties that artists face as a result of the incongruity between the proliferation of copyright infringement disputes and art norms:

> "The world is filled to suffocating. Man has placed his token on every stone. Every work, every image is leased and mortgaged. We know a picture is but a space in which a variety of images, none of them original, blend and clash. A picture is a tissue of quotations drawn from the innumerable centers of culture. . . . We can only imitate a gesture that is always anterior, never original. Succeeding the painter, the plagiarist no longer bears within him passions, humors, feelings, impressions, but rather this immense encyclopedia from which he draws."[74]

Appropriation art contains critical commentaries about society and therefore is less like "stealing" and more like a "political speech."[75] As a different medium of political speech, appropriation artists[76] should not be

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[67] *Id.* at 1579.

[68] Landes, *supra* note 39, at 1.

[69] John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 539 (2007).

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] Willajeanne F. McLean, *All's Not Fair in Art and War: A Look at the Fair Use Defense After Rogers v. Koons*, 59 BROOK. L. REV. 373, 383–84 (1993) (quoting Sherrie Levine, MAGAZINE OF THE WADSWORTH ATHENAEUM 7 (Spring 1987)).

[75] Wang, *supra* note 41, at 263.

[76] Not only appropriation artists, but all artists because all art is derivative.

held liable for copyright infringement when their work transforms the original.[77] However, the holdings in the case law do not reflect this idea. Instead, the misapplication of the fair use doctrine and judicial confusion over art norms has muddled the fair use doctrine in the visual arts.[78]

2. *All Art Is Derivative*

The renowned American artist Robert Motherwell noted: "Every intelligent painter carries the whole culture of modern painting in his head. It is his real subject, of which everything he paints is both an homage and a critique."[79] Whether consciously or not, all artists "borrow" from other artists,[80] and this is particularly true for appropriation art. Throughout history, artists have used other artists' works in their own creations.[81] This borrowing can be exemplified in Marcel Duchamp's use of Leonardo da Vinci's *Mona Lisa* in his *L.H.O.O.Q.*:

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[77] Wang, *supra* note 41, at 263.

[78] Burr, *supra* note 29, at 67.

[79] Yonover, *supra* note 8, at 121–22.

[80] *See* LIPMAN & MARSHALL, *supra* note 4, at 86 ("Such innovative artists as Roy Lichtenstein, Mel Ramos, Larry Rivers, and George Segal have reinterpreted famous works of art in terms of their own personal styles, looking at the Modern Masters for subject matter rather than for technical solutions.").

[81] *Id.* at 54.

[82] Leonardo da Vinci, *Mona Lisa*, 1503-06, oil on wood. Marcel Duchamp, *L.H.O.O.Q.*, 1912, altered reproduction. Duchamp added a mustache to a postcard of Da

Art history is a "cumulative progression" of preceding art and artists draw upon their knowledge of the past in creating their images.[83] While artists need to be protected from those who steal their expression without adding any modicum of originality, most artists would recognize that their work is part of a never ending, morphing, and symbiotic œuvre.[84] Further, if artistic movements are to develop and continue, most art has to be fairly derivative.[85]

Even though all art is derivative, a tension still exists between the first artist and the second artist.[86] However, because contemporary society values art and wants to encourage the creation of art, we want to protect both the first and the second artist. We attempt to protect both by enforcing of copyright infringement and also by allowing the fair use defense.[87] "Because art begets art, society needs to furnish incentives for artists to create."[88] Further, an artist's work is meaningless absent contextualization of the relationship between that work with others and with society in general.[89]

Vinci's *Mona Lisa. L.H.O.O.Q.* is a phonetic acronym for "elle a chaud au cul," which translates to "she has a hot ass."

[83] LIPMAN & MARSHALL, *supra* note 4, at 6–7. Lipman notes:

> The reasons that artists, American and European, borrow from other art are multiple and varied . . . An artist may reuse existing images, along with other elements, because they are available and suitable; and because they may give the borrower and the newly formed work a place within the ongoing history of art.

Id.

[84] Yonover, *supra* note 8, at 80. McLean notes:

> In truth, in literature, in science and in art, there are and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science, and art, borrows, and must necessarily borrow, and use much which was well known and used before.

McLean, *supra* note 74, at 384 n.63 (quoting Emerson v. Davies, 8 F. Cas. 615 (C.C.D. Mass. 1845)(No. 4,436)).

[85] Berys Gaut, *"Art" as a Cluster Concept, in* THEORIES OF ART TODAY 25, 32 (N□el Carroll ed., 2000).

[86] Yonover, *supra* note 8, at 80.

[87] *Id.* Yonover notes: "Because art progresses on the shoulders of prior art, we want to protect the creator of the referent and the reference . . . Our goal should be to balance their economic and personal interests very, very carefully so as not to diminish the sum of art which enriches our lives." *Id.*

[88] *Id.* at 122.

[89] *Id.* at 80. Yonover notes:

> Art is both evolutionary and revolutionary. Art mutates according to the conscious or even unconscious, sensibilities of the artist. That which has come

III. CASE LAW

A. *Judges Should Not Evaluate Artistic Merit*

There are relatively few cases that address fair use in the visual arts because most disputes are settled out of court, likely because of the uncertainty as to which legal standard a court might apply.[90] For the cases that do go to trial, there is no consistency in the holdings to create precedential guideposts for future would-be fair users.[91] Many court decisions do not incorporate art historical norms into their decisionmaking process.[92] Moreover, the fair use factors that are helpful in other contexts are not as effective when judging visual art. Further, the courts have evaluated the artistic merit of the original and secondary works rather than evaluating whether there was a copyright infringement or a fair use.[93] As Justice Holmes famously stated in *Bleistein v. Donaldson Lithographing Co.*:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.[94]

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before is fodder for artistic creation and is linked inextricably to the present. Art is history; at the same time it derives from history and affects history. In a real sense, the cave paintings of Lascaux and those recently discovered in Chauvet are our artistic ancestors. Lascaux's wooly mammoths relate to Picasso's bulls as the archaic smile on the faces of Hellenic sculpture informs the enigmatic smile of the *Mona Lisa*. 'What's past, is prologue.' But art, like history, is not static. Changes come slowly or in sudden spurts. Sometimes artistic vision breaks out of the mold and gives us a new way to look at the world. Still other artists refer explicitly to earlier works. They appropriate them and, by adding humor, sarcasm, or comment, send a parodic message to the viewer about what these earlier works now mean to contemporary society.

Id.

[90] Ames, *supra* note 8, at 1484.

[91] Burr, *supra* note 29, at 67.

[92] Ames, *supra* note 8, at 1507.

[93] *Id.*

[94] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

The judiciary has no competence to judge artistic merit.[95] Christine Farley notes that the courts try to avoid making aesthetic determinations by substituting another issue to analyze in place of the real question they are answering.[96] However, in the end, a court ultimately bases its decision on its acceptance or rejection of the art's aesthetics, while pretending that its holding is based on a non-aesthetic rationale.[97]

> As time and history, rather than courts, should be the arbiters of an artist's success in achieving her critical goals, the need seems clear for a standard more sensitive to the special public benefit gained through the creation of . . . art and to the unique concerns present in weighing its effects on the copyright holder's incentives.[98]

One example of a case that settled involved the artist Morton Beebe who sued Robert Rauschenberg when he saw that Rauschenberg used one of his photographs in a print.[99]

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[95] Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 814 (2005).

[96] *Id.* at 836.

[97] *Id.* at 836–37. Farley argues that the court in *Rogers v. Koons* based their decision on their aesthetic judgments on Koons' work rather than upon the issue, which was whether appropriation art makes fair use of a copyrighted work.

[98] Ames, *supra* note 8, at 1507.

[99] Gay Morris, *When Artists Use Photographs: Is it Fair Use, Legitimate Transformation, or Rip-Off?*, ARTNEWS, Jan. 1981 at 102, *reprinted in* JOHN HENRY MERRYMAN, ET AL., LAW, ETHICS AND THE VISUAL ARTS, 564, 565 (5th ed. 2007). Morris stated:

> Beebe was particularly upset by this unauthorized use of his copyrighted image because he knew that Rauschenberg was a leader in the artists' rights movement who had devoted time and effort to bringing the needs of artists to the attention of legislators, the media and the public . . . .Among the causes Rauschenberg has most ardently espoused is the controversial proceeds right—sometimes called the artists' royalty which gives artists a portion of the money realized when their works are resold at a profit.
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> "You have been in the lead in protecting artists' rights," Beebe wrote to Rauschenberg, "I was stunned to see one of my images so obviously borrowed without recognition."
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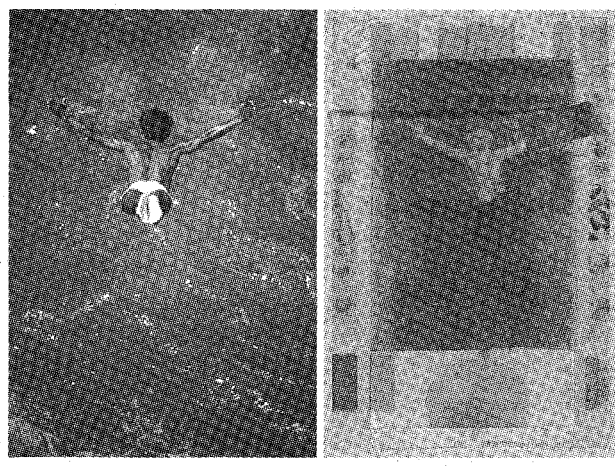
> Rauschenberg replied, indicating that he was surprised at Beebe's reaction and commenting, "I have received many letters from people expressing their happiness and pride in seeing their images incorporated and transformed in my work."

Id.

 [100]

In the end, the parties decided to settle rather than litigate, not because Rauschenberg conceded he participated in any wrongdoing, but because neither party wanted to invest more time or money in the matter.[101] Rauschenberg's attorney, wishing to make a statement regarding the fair use of visual arts, explained:

> "It is the position of Mr. Rauschenberg and Gemini G.E.L.[102] that an artist working in the medium of collage has the right to make fair use of prior printed and published materials in the creation of an original collage including such preexisting elements as a part thereof and that such right is guaranteed to the artist as a fundamental right of freedom of expression under the First Amendment of the Constitution of the United States of America."[103]

Rauschenberg said of his work:

> "Having used collage in my work since 1949 . . . I have never felt that I was infringing on anyone's rights as I have consistently transformed these images sympathetically with the use of solvent transfer, collage and reversal as ingredients in the compositions which are dependent on reportage of

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[100] Morton Beebe, *Mexico Diver*, 1974, photograph. Robert Rauschenberg, *Pull*, 1974, print. These images illustrate how Rauschenberg incorporated Beebe's photograph into his collage.

[101] Morris, *supra* note 99, at 566.

[102] Gemini G.E.L. is a Los Angeles-based graphics workshop that prints Rauschenberg's images.

[103] Morris, *supra* note 99, at 566 (quoting Irwin Spiegel, attorney for Rauschenberg and Gemini G.E.L.).

> current events and elements in our current environment, hopefully to give the work the possibility of being reconsidered and viewed in a totally new context."[104]

Neither Rauschenberg nor his attorney believed that he infringed on another artist's copyrighted work because of the requisite additional element of originality that transformed the first work into something new.[105] Further, Rauschenberg recognized that he was working under the auspices of the norms of the history of art, which has recognized that all art is derivative.[106]

B. *Cases Illustrate Uncertainty*

In the few cases that have gone to trial, there is no consistency in the holdings to provide guidance to artists or courts, which illustrates that judges do not know what is fair use in the visual arts. An examination of three well-known cases illustrates how courts reached opposite conclusions despite similar fact patterns.

1. *Steinberg v. Columbia Pictures*

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Not all courts are convinced that transformation is enough to excuse appropriation of another's work.[108] In *Steinberg v. Columbia Pictures*[109] the

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[104] *Id.* at 565–66 (quoting a letter from Rauschenberg to Beebe).

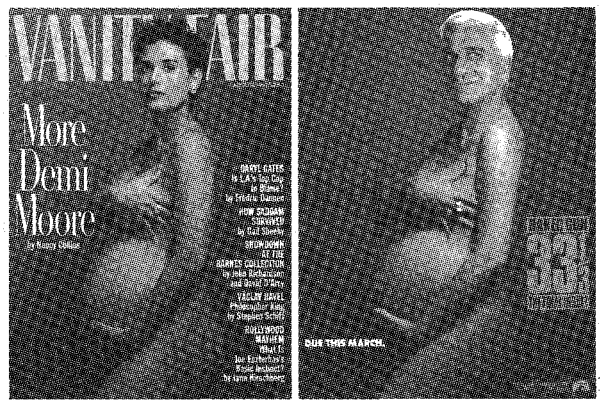
[105] Many of us have made collages, and few, if any of us, have thought that we were infringing upon copyrights by using someone else's image in our creation.

[106] Yonover, *supra* note 8, at 80.

[107] Saul Steinberg, *View of the World from 9th Avenue*, NEW YORKER MAGAZINE, Mar. 29, 1976. Columbia Pictures, *Moscow on the Hudson*, 1984, poster. Columbia Pictures transformed Steinberg's well-known magazine cover into their movie poster.

artist Saul Steinberg filed suit against Columbia Pictures alleging that their movie poster infringed his copyright for an illustration that appeared on the cover of The New Yorker.[110] Judge Stanton rejected the defendants' fair use defense that their movie poster evoked Steinberg's illustration and therefore was justified as a parody.[111] Judge Stanton stated that defendants' use of Steinberg's illustration was not a parody and therefore not a fair use because defendants' variation was not aimed at some aspect of Steinberg's illustration.[112] Instead, the defendants "merely borrowed numerous elements from Steinberg to create an appealing advertisement to promote an unrelated commercial product."[113]

2. *Leibovitz v. Paramount Pictures*



[114]

In a similar case, the Second Circuit came to the opposite conclusion. In *Leibovitz v. Paramount Pictures*,[115] the famed photographer Annie Leibovitz

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[108] *See generally* United Feature Syndicate, Inc. v. Koons, 817 F. Supp. 370 (S.D.N.Y. 1993); Campbell v. Koons, No. 91 Civ. 6055, 1993 WL 97381 (S.D.N.Y. Apr. 1, 1993); Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992); and Steinberg v. Columbia Pictures, 663 F. Supp. 706 (S.D.N.Y. 1987).

[109] *Steinberg*, 663 F. Supp. at 706.

[110] *Id.* at 708.

[111] *Id.* at 714.

[112] *Id.*

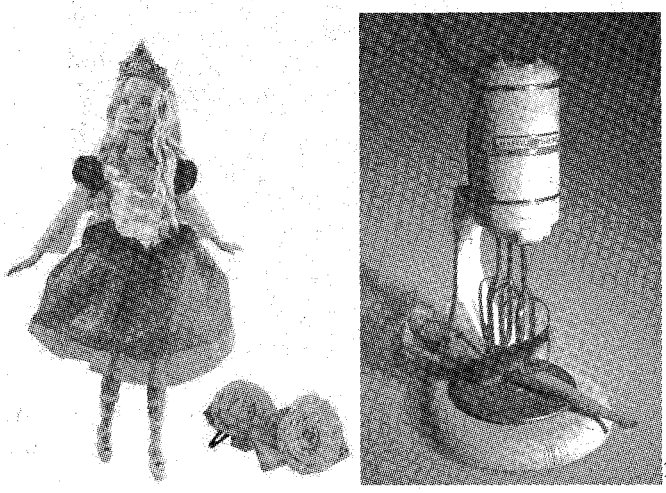
[113] *Id.* at 715.

[114] Annie Leibovitz, *Demi Moore*, VANITY FAIR, Aug. 1991, photograph. Paramount Pictures, *Naked Gun 33 1/3*, 1994, poster.

[115] Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 109 (2d Cir. 1998).

sued Paramount Pictures for copyright infringement.[116] Paramount made a movie poster for *Naked Gun 33/13: The Final Insult.*[117] The movie poster depicted a naked and "pregnant" Leslie Nielsen, which was clearly a spoof of Leibovitz's photograph of Demi Moore that was featured as the cover of *Vanity Fair* in August, 1991.[118] Judge Newman held that Paramount's poster constituted a fair use.[119] The court made a strained argument that the Paramount Pictures poster commented on the "self-importance conveyed by the subject of the Leibovitz photograph."[120] However, it is not clear the movie poster was commenting upon the original work; it could be argued, as it was in *Steinberg*, that Paramount was using elements of expression from Leibovitz's work to create an appealing advertisement and thus infringed on her copyright.[121]

3. *Mattel v. Walking Mountain Productions*

 [122]

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[116] *Id.* at 110.

[117] *Id.* at 111.

[118] *Id.* at 111–12.

[119] *Id.* at 110.

[120] *Id.* at 114.

[121] The defendant in *Steinberg v. Columbia Pictures*, 663 F. Supp. 706 (S.D.N.Y. 1987), attempted unsuccessfully to argue that their movie poster was a parody of Steinberg's original art.

[122] Mattel, *Barbie*. Thomas Forsythe, *Food Chain Barbie, Mixer Fun*, date unknown, photograph.

Finally, in yet another similar case, the Ninth Circuit found that the artist's use was fair.[123] In *Mattel v. Walking Mountain Productions*, Mattel brought suit against the photographer Thomas Forsythe.[124] Forsythe photographed naked Barbie dolls in a series of comedic and sexualized scenarios.[125] Forsythe stated that he created these scenes to "critique the objectification of women associated with [Barbie], and to lambast the conventional beauty myth and the societal acceptance of women as objects because this is what Barbie embodies."[126] The Ninth Circuit agreed that Forsythe's use of Mattel's copyrighted dolls was a parody and highly transformative, therefore, it was a fair use.[127]

The holdings from *Leibovitz* and *Mattel* suggest that if the artist uses the original as a source for commentary or criticism, the court will find a fair use, as stated in the Copyright Act.[128] However, this is not always the case; compare those cases to three other cases involving the contemporary American artist Jeff Koons, in which the contrary seems to be true: *Rogers v. Koons*,[129] *United Feature Syndicate, Inc., v. Koons*,[130] and *Blanch v. Koons*.[131]

C. *The Koons Cases*

The Koons cases best exemplify judicial confusion over what constitutes fair use. This is because there is no consistency in the courts holdings.

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[123] Mattel v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003).

[124] *Id.* at 796.

[125] *Id.*

[126] JOYCE, *supra* note 12, at 795.

[127] *Mattel*, 353 F.3d at 806.

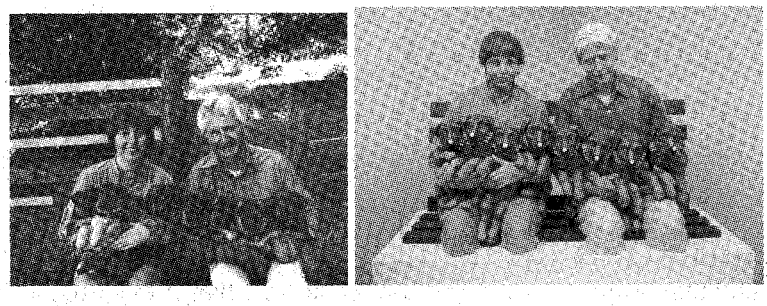
[128] 17 U.S.C. § 107 (2006). The statute provides that fair use may be found in uses reproduced for purposes such as criticism or comment. *Id.*

[129] Rogers v. Koons, 960 F.2d 301, 301 (2d Cir. 1992).

[130] United Feature Syndicate, Inc., v. Koons, 817 F.Supp. 370, 370 (S.D.N.Y. 1987).

[131] Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006).

1. *Rogers v. Koons*

 [132]

In the first case, *Rogers v. Koons*, the photographer Art Rogers brought a suit against Jeff Koons for his use of Rogers' photograph, *Puppies*, to create a sculpture Koons entitled *String of Puppies*.[133] Rogers took a photograph of his friend Jim Scanlon and his wife holding their eight German Shepherd puppies.[134] Rogers later licensed the photograph to Museum Graphics, a company that produced note cards with images of the photograph.[135] Koons purchased the note card and decided to use it to create a work for his "Banality Show" at the Sonnabend Gallery in New York, which opened in November 19, 1988.[136]

Koons instructed his artisans to copy the photograph into sculpture form.[137] He dictated that the sculpture must capture the features of the photograph.[138] Koons then added his own twists by painting the puppies blue, putting daisies in the couple's hair, and giving the puppies large, bulbous noses.[139] He titled the resulting work, "String of Puppies."[140]

Koons argued that his use of Rogers' *Puppies* to create *String of Puppies* was a fair use;[141] his sculpture was a satire or parody on contemporary society.[142] Koons stated that he belongs to the school of artists

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[132] Art Rogers, *Puppies*, 1980, photograph. Jeff Koons, *String of Puppies*, 1988, painted wood.

[133] *Rogers*, 960 F.2d at 303.

[134] *Id.* at 304.

[135] Rogers v. Koons, 960 F.2d 301, 304 (2d Cir. 1992).

[136] *Id.* at 305.

[137] *Id.*

[138] *Id.*

[139] *Id.* at 308.

[140] *Id.*

[141] Rogers v. Koons, 960 F.2d 301, 308 (2d Cir. 1992).

[142] *Id.* at 309.

> who believe the mass production of commodities and media images has caused a deterioration in the quality of society, and this artistic tradition of which he is a member proposes through incorporating these images into works of art to comment critically both on the incorporated object and the political and economic system that created it.[143]

The Second Circuit rejected this rationale and held that it was not a fair use because they thought it was difficult to discern any critique of Rogers' photograph, even though Koons used the photograph to critique society at large.[144] The court failed to realize that Koons was making a social commentary; he was using the photograph as an exemplar of the banal images that have become so pervasive in popular culture.[145]

The court worked through the four fair use factors and concluded that Koons did not produce *String of Puppies* for any reason other than to profit from the exploitation of Rogers' photograph.[146] The court went so far as to say, "In short, it is not really the parody flag that appellants are sailing under,

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[143] *Id.* There are two camps that weigh in on the relevance of artists' intent in fair use analysis. The first determines that the spectator has as great a role, if not greater a role, than the artist in determining whether a work is art and whether it is original. This camp would support the decision in *Rogers v. Koons*. Despite Koons' explanations of his intent for the sculpture, the court did not see an original work of art that transformed the source. Instead, they saw a theft of a copyrighted expression used for personal economic benefit.

The other camp gives more support to the intent of the artist and uses Koons as a representative of the idea that it is the artist who determines what is art. Spence, *supra* note 64, at 217. Spence notes,

> Koons's work falls within a tradition that plays with the authority of the artist to determine what counts as art, and to do so by acts of appropriating 'found' or 'ready-made' objects, but this trial [Rogers v. Koons] became an almost comic battle between the authority of the artist and the authority of the law.

Id. This second camp believes that the court is not in the position to determine what is and what is not art. BUSKIRK, *supra* note 63, at 249.

[144] *Rogers*, 960 F.2d at 310; *see also* Burr, *supra* note 29, at 67. Burr notes Justice Posner supports dividing parodies into two categories: those that target the original work and those that use the original as a weapon. Those that target the original would be protected as a fair use, but those that use the original as a weapon would not be protected. Here, the court seems to follow this rationale by categorically assuming that anything that comments on an original is a parody. Since Koons does use Rogers' photograph as a weapon to point out the banal images that pervade society, his use would not be protected under this rationale. Again, however, Koons' work is not a parody, but social commentary.

[145] Ames, *supra* note 8, at 1505–06.

[146] *Rogers*, 960 F.2d at 312.

but rather the flag of piracy."[147] This holding did not acknowledge that the fair use doctrine does not protect only parody; it also—not exclusively—protects criticism, and comment.[148] Koons never argued that his work was a parody, he argued for social criticism as a fair use, but the court did not deem these points relevant in their analysis.[149]

Various scholars have noted that the court in *Rogers v. Koons* acted as an art critic in their analysis, and that is not their role.[150] The holding in *Rogers v. Koons* was met with much opposition because it was thought to limit artistic creativity.[151] William Landes and Lynne Greenberg think the holding may put an end to appropriation art, "undermine artistic freedom, and retard innovation."[152] The holding from this case infringes upon an artist's creative freedom to choose their subject and method of expression.[153] Instead of focusing on the substantiality of Koons' use of Rogers' work, the court should have asked whether Koons transformed Rogers' work, thereby creating an original work.[154]

After this holding, it is unclear when and what an artist may use as source material "when nearly every image she would find of interest (commercial products, media images, and works by other artists) is protected intellectual property and therefore off limits."[155] Willajeane McLean argues that the court "failed to articulate a standard by which post-modern artists

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[147] Rogers v. Koons, 960 F.2d 301, 311 (2d Cir. 1992).

[148] 17 U.S.C. § 107 (2006). The statute states, "the fair use of a copyrighted work . . . for purposes such as criticism, comment . . . scholarship, or research, is not an infringement of copyright." *Id.*

[149] *Rogers*, 960 F.2d at 309–10.

[150] Lynne A. Greenberg, *The Art of Appropriation: Puppies, Piracy, and Post-Modernism*, 11 CARDOZO ARTS & ENT. L.J. 1, 29 (1992). Greenberg continued to note, "In order to be deemed 'proper' criticism, a work had best be a rather obvious parody of the underlying work—otherwise, the court may miss the critical nature of the work altogether." *Id.*; *see also* Farley, *supra* notes 95–97.

[151] Landes, *supra* note 39, at 21. The court was correct in saying that Koons was not flying under the flag of parody. He was flying under the flag of social commentary, which is a permissive use under section 107.

[152] *Id.*; *see also* Greenberg, *supra* note 150, at 29. Greenberg notes that the court's dismissal of Koons' justification that he was working within an artistic tradition of commenting upon the commonplace, "effectively discredited an entire artistic movement." *Id.* Further, "[i]t is not the proper role of the court to be making pronouncements about what does and does not constitute proper criticism in the realm of the visual arts." *Id.*

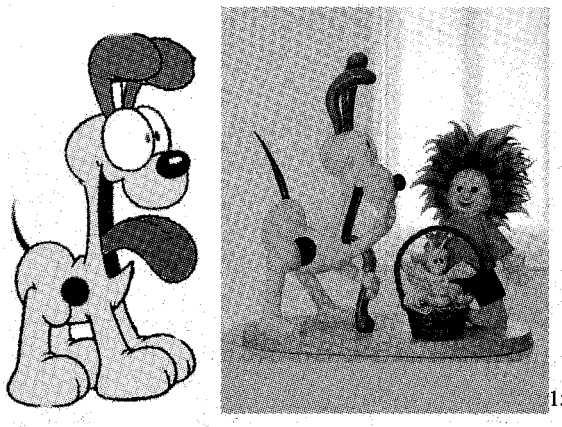
[153] McLean, *supra* note 74, at 421.

[154] *Id.*

[155] Greenberg, *supra* note 150, at 29.

such as Jeff Koons can create art without the specter of lawsuits hanging like the sword of Damocles over their heads."[156]

2. *United Feature Syndicate, Inc. v. Koons*

 [157]

At issue in Koons' second case, *United Feature Syndicate, Inc. v. Koons*, were four identical sculptures he produced entitled *Wild Boy and Puppy*, which contain unauthorized images of *Odie* from the *Garfield* comic strip.[158] The court applied the four fair use factors to determine whether Koons' use was fair.[159] The court held that his use was not fair because they thought he knowingly exploited a copyrighted work for personal gain.[160]

The court gave little weight to the social criticism and therefore transformative nature of Koons' four sculptures that were part of his "1988 Banality Show."[161] He used the *Odie* character to "symbolize the cynical and

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[156] McLean, *supra* note 74, at 374–75.

[157] Jim Davis, *Odie*. Jeff Koons, *Wild Boy and Puppy*, 1988, multimedia.

[158] United Features Syndicate, Inc. v. Koons, 817 F. Supp. 370, 373 (S.D.N.Y. 1993).

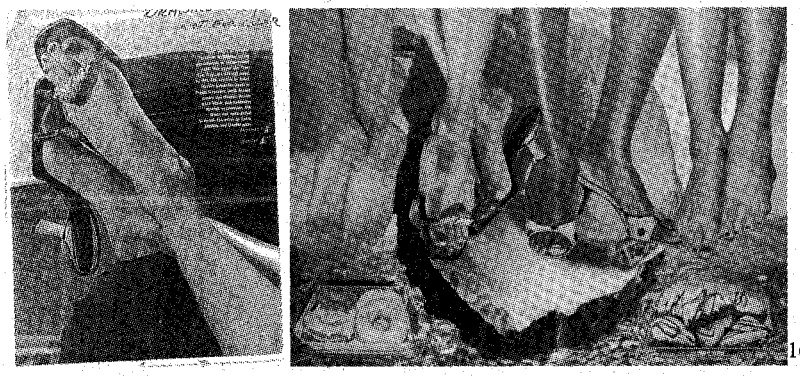
[159] *Id.* at 379–82.

[160] *Id.* at 379. This was the same rationale that was used in Campbell v. Koons, No. 91 Civ. 6055 (RO), 1993 WL 97381, at *3 (S.D.N.Y. Apr. 1, 1993). In that case, Barbara Campbell brought suit against Koons for using a photographic image on a postcard as inspiration for a wood sculpture. *Id.* at *2. The court held that Koons infringed Campbell's copyright for her photograph. *Id.* at *8.

[161] *United Features*, 817 F. Supp. at 379–80. When analyzing the first factor, the purpose and character of Koons' work, the court did not address the fact that Koons' work transformed the original, but instead focused on the commercial nature of Koons' work. *Id.*

empty nature of society."[162] Based on the transformative, satirical use and the holding in *Mattel*, one would have expected that the court would have found the use to be fair. However, the court gave more weight to the commercial—rather than artistic—nature of the work, and held that there was no fair use.[163]

3. *Blanch v. Koons*

 [164]

Finally, in *Blanch v. Koons*, the Second Circuit took a different stance from its earlier holding in *Rogers v. Koons*.[165] In *Blanch v. Koons*, Andrea Blanch, a fashion photographer, sued Koons for copyright infringement.[166] Koons used Blanch's photograph in one of his *Easyfun-Ethereal* paintings, *Niagara*.[167] Koons took Blanch's photograph, *Silk Sandals by Gucci*, from an Allure magazine article about metallic cosmetics, scanned it onto his computer, altered it by extracting only the legs from the photograph, modified them, and then superimposed them onto a pastoral landscape along with other images.[168]

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[162] *Id.* at 383.

[163] *Id.* at 385.

[164] Andrea Blanch, *Silk Sandals by Gucci*, 2000, photograph. Jeff Koons, *Niagara*, 2000, oil on canvas.

[165] Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006). *Blanch v. Koons* was decided after *Campbell v. Acuff-Rose*, which might explain the more sympathetic treatment of the artist.

[166] *Id.* at 246.

[167] *Id.* at 247.

[168] *Id.* at 247–48.

In coming to its holding, the court focused on Koons' intent for using Blanch's photograph.[169] They explained that Koons' objective in using Blanch's work was different from Blanch's objective in creating her photograph.[170] Koons asserted that he wanted "the viewer to think about his/her personal experience with these objects, products, and images and at the same time gain new insight into how these affect our lives."[171] Koons used Blanch's image "as fodder for his commentary on the social and aesthetic consequences of mass media."[172] Blanch, on the other hand was trying to convey eroticism and sexuality through her photograph.[173] The court held the difference in their objectives was indicative that Koons' use transformed Blanch's image.[174] Koons didn't "repackage" Blanch's photograph, but rather used it "in the creation of new information, new aesthetics, new insights and understandings."[175] The court did not fault him for directly copying Blanch's image:

> By using a fragment of the Allure photograph in my painting, I thus comment upon the culture and attitudes promoted and embodied in Allure Magazine. By using an existing image, I also ensure a certain authenticity or veracity that enhances my commentary—it is the difference between quoting and paraphrasing—and ensure that the viewer will understand what I am referring to.[176]

Despite the fact that Koons appropriated Blanch's image, the court found that the use was fair.[177] The court concluded by stating that "copyright law's goal of 'promoting the Progress of Science and useful Arts,' . . . would be better served by allowing Koons's use of 'Silk Sandals' than by preventing it . . . "[178] The Second Circuit finally recognized that it is an industry

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[169] *Id.* at 252.

[170] *Id.*; *see also* note 143 *supra* for the discussion about the relevance of an artist's intent.

[171] Blanch v. Koons, 467 F.3d 244, 252 (2d Cir. 2006).

[172] *Id.* at 253.

[173] *Id.* at 252.

[174] *Id.*

[175] *Id.* (quoting *Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 142 (2d Cir. 1998)). This case is often cited to determine if a use is "transformative." *Id.*

[176] *Id.* at 255.

[177] Blanch v. Koons, 467 F.3d 244, 259 (2d Cir. 2006).

[178] *Id.*

standard to appropriate art, and because Koons transformed the source art, it was a fair use.[179]

D. *Current Case Law Fails to Provide Guidance*

The holdings from the Koons cases illustrate that there is no consistent standard to apply to fair use in the visual arts. Even at the Supreme Court level, Justice Souter's analysis in *Campbell v. Acuff Rose* provides no guidance.[180] In that holding, he seems to authorize fair uses for the purpose of parody, but not for satire, when he states, "If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly."[181] However, he continues to state directly after that there may be occasions when a satire could be a fair use.[182] This confusion is reflected in the case law where sometimes a parody is a fair use, and sometimes it is not; sometimes a satire is a fair use, and sometimes it is not.[183]

Ultimately, *Campbell*'s confusing holding creates ambiguous standards that force artists to demonstrate whether their work is a parody or satire.[184] This is easier said than done because the distinction between the two is contrived.[185] Both parodic and satirical uses are transformative and both provide a form of commentary.[186] Further, the public benefits more from satire than parody when artists can make use of a recognized work to criticize

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[179] *Id.* at 252.

[180] Einhorn, *supra* note 63, at 602–03.

[181] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994). Other commentators have followed this same line of thinking. Richard Posner believes that satires are not fair uses when they use the original work not to comment upon it, but to use that original work to attack something else. Richard A. Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 67 (1992).

[182] *Campbell*, 510 U.S. at 580 n.14.

[183] Burr, *supra* note 29, at 67.

[184] Einhorn, *supra* note 63, at 603.

[185] *Id.*

[186] *Id.*; *see also* Roxana Badin, *An Appropriate(d) Place in Transformative Value: Appropriation Art's Exclusion from* Campbell v. Acuff-Rose Music, Inc., 60 BROOK. L. REV. 1653, 1653–54 (1995). Badin notes that in the *Campbell* decision, "the court ignored the transformative value of a creative work that criticizes without parodying its target and allowed a presumption to remain against the work's commercial character, thereby jeopardizing its immunity as fair use." *Id.*

cultural values or politics.[187] It is unclear how a parody that ridicules an individual work provides a greater social benefit when it operates on such a narrow scale.[188] Therefore, the distinction between parody and satire is arbitrary and not useful for copyright law.[189]

Judicial interpretation of the fair use doctrine, as it applies to the visual arts, provides little guidance to potential fair users for a number of reasons.[190] First, these cases are unhelpful because the holdings are so case-specific.[191] Without a bright line rule, artists are forced to run the risk of being subject to a copyright infringement suit, or they must attempt to obtain licenses for the images that they wish to incorporate into their own works.[192] Neither are satisfactory solutions.[193] No one wants to run the risk of setting themselves up for a lawsuit.[194] Moreover, artists may be unfamiliar with licensing procedures and copyright law and are not in a position to deal with licensing requirements.[195] There is no method to force an artist to license out their work, so they essentially hold a monopoly interest.[196] The result is a "chill" on artistic production.[197]

A second reason why these cases are not helpful is because they focus on countless technical violations of copyright law, which art norms regard as "innocuous."[198] Copyright law's tests for infringement and fair use are problematic in the art context because copyright law does not "recognize and contextualize" the routine and standard copying involved in creating art.[199] Further, direct copyright infringement absent a fair use defense is a strict liability offense, so even a minor unauthorized use may result in major liability.[200] "The predictable result is overdeterrence, as users tend to wilt in

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[187] Einhorn, *supra* note 63, at 603.

[188] *Id.* at 604.

[189] *Id.* at 603.

[190] Arewa, *supra* note 4, at 486–87; Carroll, *supra* note 2, at 1090; David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 152 n.64 (2009).

[191] Carroll, *supra* note 2, at 1090.

[192] Meeker, *supra* note 3, at 213.

[193] Yonover, *supra* note 8, at 103–04.

[194] Carroll, *supra* note 2, at 1096.

[195] Meeker, *supra* note 3, at 213.

[196] *Id.*

[197] *Id.*

[198] Fagundes, *supra* note 190, at 152 n.64.

[199] Arewa, *supra* note 4, at 486–87.

[200] Fagundes, *supra* note 190, at 152.

the face of threats and liability, however dubious."[201] One commentator claimed, "'if these copyright laws had been applied from 1905–1975, we would not have modern art as we know it.'"[202]

IV. UDRP ARBITRATION METHOD AS A MODEL

The arbitration model utilized to resolve disputes involving cybersquatting could be used as a model to resolve disputes involving fair use in the visual arts.

A. *The UDRP*

The Uniform Domain Name Dispute Resolution Policy (UDRP) was established through collaboration between the Internet Corporation for Assigned Names and Numbers (ICANN)[203] and the World Intellectual Property Organization (WIPO).[204] The UDRP was established in response to the inconsistent case law involving cybersquatting and trademark law.[205] The UDRP resolves disputes involving cybersquatting.[206] "Cybersquatting involves the pre-emptive, bad faith registration of trademarks as domain names by third parties who do not possess rights in such names."[207]

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[201] *Id.*

[202] Landes, *supra* note 39, at 17 (quoting art dealer Jeffrey Deitch).

[203] ICANN.com, http://www.icann.org/en/about/ (last visited Jan. 24, 2010). ICANN is a nonprofit public-benefit corporation with participants worldwide "dedicated to keeping the Internet secure, stable and interoperable . . . It promotes competition and develops policy on the Internet's unique identifiers." *Id.*

[204] WIPO, *supra* note 9, at 2. WIPO "is an independent intergovernmental organization headquartered in Geneva, Switzerland, comprising 179 Member States. WIPO's principal objective is to promote, through international cooperation, the creation, use, dissemination and protection of intellectual property." *Id.*

[205] Orion Armon, *Is This as Good as It Gets? An Appraisal of ICANN's Uniform Domain Name Dispute Resolution Policy (UDRP) Three Years After Implementation*, 22 REV. LITIG. 99, 107 (2003).

[206] *Id.* at 100.

[207] WIPO, *supra* note 9, at 3.

1. *Procedure*

Those who register for a domain name must agree to the UDRP.[208] One aspect of the UDRP is that registrants are required to submit to arbitral proceedings.[209] Trademark owners may submit disputes surrounding alleged abusive registration of domain names to a mandatory arbitral proceeding if they file a complaint online with an approved dispute resolution provider.[210] The complainant[211] must file a complaint against the respondent[212] that asserts and subsequently proves (1) the respondent's domain name "is identical or confusingly similar to a trademark or service mark in which the complainant has rights;" (2) the respondent "has no rights or legitimate interests in respect [to] the domain name;" and (3) "the [respondent's] domain name has been registered and is being used in bad faith."[213] Once the complaint is filed, the respondent has twenty days to respond.[214] If the respondent does not respond, the panel makes a decision based upon the complaint filed online and in hard copy.[215] There is no oral hearing of the complaint.[216] If the complainant successfully proves the three required elements, the panel will order that the domain name be transferred to the complainant.[217] "Neither monetary nor injunctive relief is available."[218]

Each party, in their complaint or response, can specify whether they prefer a one-member panel or a three-member panel.[219] The panelists are selected based upon their "reputations, impartiality, sound judgment and

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[208] *Id.* at 5.

[209] *Id.*

[210] *Id.*

[211] *Id.* at 9. "The complainant is any person or entity, claiming trademark or service mark rights, who initiates a complaint concerning a domain name registration in accordance with the UDRP." *Id.*

[212] "The respondent is the holder of the domain name registration against which a complaint is initiated." *Id.*

[213] WIPO, *supra* note 9, at 7.

[214] ICANN, *Rules for Uniform Domain Name Dispute Resolution Policy*, http://www.icann.org/en/dndr/udrp/uniform-rules.htm (last visited Mar. 20, 2010).

[215] *Id.*

[216] WIPO, *supra* note 9, at 14.

[217] Ian Barker, *Thoughts of an Alternative Dispute Resolution Practitioner on an International ADR Regime for Repatriation of Cultural Property and Works of Art, in* ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE, 483, 486–87 (Barbara T. Hoffman ed., 2006).

[218] WIPO, *supra* note 9, at 14.

[219] *Id.* at 11.

experience as decisionmakers, as well as for their substantive experience in the areas of intellectual property law, electronic commerce and the Internet."[220] To ensure that decisions are consistent, "the WIPO Center provides its panelists with a standard decision format," copies of new decisions on a daily basis, an index of UDRP decisions, an online forum, meetings and workshops, and procedural support.[221] The panel reviews the complaint and response, and issues a decision within fourteen days, which "is published to the parties within three calendar days after the decision [was] made," and it takes effect ten days later unless judicial proceedings have begun.[222]

2. *Judicial Proceedings*

UDRP policy does not preclude either party from bringing their claim to court.[223] "The UDRP is not meant to replace litigation," like conventional arbitration, but instead serves as an additional forum to resolve disputes with a right to appeal to the courts.[224] Either party may bring suit in court "before, during, or after a UDRP proceeding" to challenge the decision.[225] After the panel issues its decision, it waits ten days until the binding decision is implemented.[226] If during that ten day period, the panel receives official documentation that a party has commenced a lawsuit, it will not implement the panel's decision and will not take further action until alerted to do so.[227] WIPO notes that in practice the parties rarely bring their cases in front of any court.[228]

3. *Advantages of the UDRP*

There are a number of advantages that the UDRP has over judicial determinations.[229] First, the UDRP policy was established because many of

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220 *Id.*

221 *Id.*

222 Armon, *supra* note 205, at 121.

223 WIPO, *supra* note 9, at 6.

224 David E. Sorkin, *Judicial Review of ICANN Domain Name Dispute Decisions*, 18 SANTA CLARA COMPUTER & HIGH TECH. L.J. 35, 51–52 (2001).

225 WIPO, *supra* note 9, at 6.

226 *Id.* at 14.

227 ICANN, *supra* note 214.

228 WIPO, *supra* note 9, at 6.

229 *Id.* at 3–7.

the internet domain name disputes were international, and so courts were not always able to provide an effective solution to the problem.[230] Unlike courts, the UDRP "provides a single mechanism for resolving a domain name dispute regardless of where the registrar, the domain name registrant, or the complaining trademark owner is located."[231] The "UDRP panels base their decisions on the policy" and only consider legal rules occasionally if relevant.[232] Second, litigation is slow and expensive, and the arbitral format is a quicker and less expensive way to solve any disputes.[233] The UDRP procedure is time and cost-effective, especially considering disputes that take place on an international stage.[234] WIPO reports that cases are normally concluded within two months of filing and the fees are fixed and moderate.[235] Third, "[a]ny national law . . . is subservient to the policy."[236] A fourth advantage is the "mandatory implementation of [the] decision."[237] "There are no international enforcement issues, as registrars are obliged to take the necessary steps to enforce any UDRP transfer decisions."[238] A final advantage of the UDRP—and most relevant to this discussion—is that the panel members are comprised of decisionmakers with "substantive experience in the areas of intellectual property law, electronic commerce, and the Internet."[239]

4. *Differences Between the UDRP and Conventional Arbitration*

The UDRP differs "from conventional arbitration in a number of ways."[240] First, "participation in [arbitral] proceedings is mandatory for domain name registrants" as opposed to being a process entered into voluntarily by the participants.[241] Second, "UDRP decisions are not binding," whereas traditional arbitral awards are binding.[242] Under traditional

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[230] *Id.* at 3.

[231] *Id.* at 5.

[232] Sorkin, *supra* note 224, at 50–51.

[233] WIPO, *supra* note 9, at 3.

[234] *Id.* at 5–6.

[235] *Id.* at 6.

[236] Barker, *supra* note 217, at 487.

[237] WIPO, *supra* note 9, at 6.

[238] *Id.*

[239] *Id.* at 11.

[240] Sorkin, *supra* note 224, at 41.

[241] *Id.* at 41–42.

[242] *Id.* at 42.

arbitration, the parties trade their "right to appeal for a speedier, less expensive" process where it is certain there will be a resolution.[243] Under the UDRP, a losing party can block implementation of the holding by filing a lawsuit.[244] Third, UDRP proceedings are conducted almost exclusively online through submission of documents, and live hearings are rare.[245]

B. *Rationale for Enactment of the DRPVA*

What makes the UDRP successful is that it is an arbitral system that addresses a specific field, utilizing experts from that area. The arbitration model as exemplified in the UDRP could serve as a guide to resolve fair use disputes for visual arts.[246] I propose that those who register for a copyright with the Copyright Office must agree to the Dispute Resolution Procedure for the Visual Arts (DRPVA).[247]

1. *Expert Arbiters*

An arbitral tribunal would be able to provide an effective and clear resolution to fair use disputes in the visual arts for a number of reasons.[248] First, the pool of arbitrators would all be experts in the field of fair use as it applies to the visual arts.[249] The arbitrator's expertise in the arts would allow them to reach conclusions that reflect standards in the industry for what should and should not be an infringing use.[250] The "ordinary observer" test utilized by courts is ill-suited for disputes involving art, because the

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[243] *JAMS Ethics Guidelines for Arbitrators*, *in* DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 307, 307 (Phyllis Bernard & Bryant Garth eds., 2002).

[244] Sorkin, *supra* note 224, at 42.

[245] *Id.*

[246] David Nimmer wrote a proposed amendment to 17 U.S.C. § 107 to clarify the fair use doctrine in general. He named his Act, "The Fair Use Determination Given Expeditiously under the Statutory Indicia for Calibrating Liability and Enforcement Act ('The FUDGESICLE Act')." David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, 24 CARDOZO ARTS & ENT. L.J. 11, 12 (2006). In his proposal, he uses an arbitral panel to resolve the disputes. His proposal is not specific to the visual arts and it places the burden on the potential fair user to bring the claim, rather than on the source artist as proposed in this article.

[247] WIPO, *supra* note 9, at 5. The UDRPVA does not exist; this is my proposed solution.

[248] PHILLIP CAPPER, INTERNATIONAL ARBITRATION: A HANDBOOK 2 (3d ed. 2004).

[249] Sorkin, *supra* note 224, at 38.

[250] *Id.* at 38.

decisionmaker needs "to possess the knowledge of art history necessary to assess the relative uniqueness of the [artist's] artistic expression."[251]

The case law in this area illustrates that there is a disconnect between the court's perception of the creative process and the reality that all art is derivative.[252] When determining whether a copyright infringement has occurred, courts have focused their analysis on the two works at issue and not upon the broader context in which the works were created.[253] By limiting their gaze to a straight comparison between the two works, the courts make "questionable assumptions and rationalizations . . . that rely on fairly contorted theories of access rather than [on] the potential that both might arise from common sources or traditions in the broader cultural context."[254] By not contextualizing art within the norms of the history of artistic creation, courts based their decisions on the assumption that borrowing from another artist is verboten and that the source work was created without reference to, guidance, or inspiration from any other art.[255]

Unlike the courts, an arbitral panel of art experts would bridge the concept of copyright infringement with the concept that all art is derivative.[256] By doing so, the arbitral panel will be able to distinguish cases that involve true theft of an artist's expression from those cases where an artist merely appropriates and transforms a source artist's work, thereby creating an original piece of art that adds "new information, new aesthetics, new insights and understandings."[257] Transforming and creating new art is the "type of activity that fair use doctrine intends to protect" in order to

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[251] Donald S. Chisum, *Copyright Law and the Artist*, *in* LAW AND THE VISUAL ARTS 117, 121 (Leonard D. DuBoff & Mary Ann Crawford DuBoff eds., 1974).

[252] Arewa, *supra* note 4, at 488.

[253] *Id.* at 530.

[254] *Id.* at 530–31.

[255] *Id.* at 551.

[256] *See* Ferguson v. Writers Guild of America, West, Inc., 277 Cal. Rptr. 450 (Cal. Ct. App. 1991) (demonstrating that a panel of experts has been successfully utilized in the film and television industries). The arbitrators are "Writers Guild members with credit arbitration experience or with at least three screenplay credits of their own." *Id.* at 1387. The fact that the arbiters are also members of the Guild ensures that they have firsthand knowledge of the industry and its intricacies. The court in Ferguson stated that even though judges are able to assess the parties' arguments, that "the credit-determination process can be handled both more skillfully, more expeditiously, and more economically by Writers Guild arbitration committees than by courts." *Id.* at 1389.

[257] Pierre N. Leval, Comment, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

enrich society.[258] The expert arbitral panel would refine the narrative of what constitutes authorship and accepted copying in the art world.[259]

2. *International Acceptance of Arbitral Awards*

A second rationale for enacting the DRPVA is that there is international acceptance of arbitral tribunals, which would be helpful to solve art disputes, which often cross not only state jurisdictions, but national ones as well.[260] An arbitral tribunal operates across a variety of legal systems.[261] Further, the arbitral awards are enforceable worldwide.[262] The New York Convention states that an award from an arbitral tribunal in one country can be enforced in any other country that subscribes to the convention.[263]

3. *Cost*

A third benefit would be that like the UDRP, the arbitral process under the DRPVA would be quicker and cheaper than conventional litigation.[264] Litigation involves large expenditures of money that artists may not be capable of making so they do not pursue a suit no matter how meritorious their claims.[265] One scholar noted that the UDRP has been successful in fulfilling its promise to provide an inexpensive and quick method of dispute resolution.[266]

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[258] *Id.*

[259] Arewa, *supra* note 4, at 551.

[260] Barker, *supra* note 217, at 484.

[261] *Id.*

[262] *Id.* at 483.

[263] Safety Nat'l Cas. Corp v. Certain Underwriters at Lloyd's London, 587 F.3d 714, 717 (5th Cir. 2009) (rehearing en banc); *see also* Owen C. Pell, *The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted During World War II*, 10 DEPAUL-LCA J. ART & ENT. L. 27, 42 (1999). Pell notes that the art market has become increasingly global since art moves between museums and galleries for sale and exhibition. *Id.*

[264] WIPO, *supra* note 9, at 5.

[265] Rebecca Keim, *Filling the Gap Between Morality and Jurisprudence: The Use of Binding Arbitration to Resolve Claims of Restitution Regarding Nazi-Stolen Art*, 3 PEPP. DISP. RESOL. L.J. 295, 314 (2003).

[266] Armon, *supra* note 205, at 111–12. Armon notes that "the UDRP costs from $750 to $1,500 for a single panelist to resolve a dispute over a single domain name." *Id.* at 112. The WIPO guide states that cases filed with the center are normally concluded within two months. WIPO, *supra* note 9, at 6.

4. *Claimant Bears Burden of Proof*

A fourth advantage would be that the registrant copyright owner bears the burden of proving that their copyright has been infringed by an unfair use.[267] This would serve a number of purposes. Shifting the burden to the copyright owner is the most efficient option. In the alternative, to expect an artist to contact every artist who inspired them and to obtain permission from these artists to use their work as social commentary is unrealistic. It would be impossible to contact every source artist, and further, it is unlikely that a source artist would agree to the use.[268] Instead, by placing the burden on the source artist, they might be more thoughtful and discerning as to whether the secondary artist's use truly is unfair before starting legal proceedings. This would lessen the number of disputes and allow for unfettered creation.

Shifting the burden to the source artist also makes sense because the source artist best knows whether infringement to his copyright has occurred.[269] Therefore it would not be a problem to ask the source artist to bear the burden of proving how the secondary artist has infringed his copyright.[270] It is a delicate balance to strike because too much protection of the source artist could dampen creativity out of fear of infringement, but too much protection of the secondary artist could cause the source artist to lose the incentive to create if they lose their right to control derivative works.[271]

5. *Establishment of Uniformity*

Finally, an arbitral tribunal would establish a uniform method for disseminating information about what is a fair use and what is not.[272] Absent an arbitral system, the variety in the case law does not provide any real solutions for the artist. Since case law does not provide any guidance, controversies arise and artists must get involved in timely and costly

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[267] WIPO, *supra* note 9, at 9; *see also* Nimmer, *supra* note 246. Nimmer instead proposes in his non-binding arbitration act that the burden be placed on the secondary artist who wishes to use the source artist's work. *Id.* at 12–15. As described here, this is not the most efficient solution to the problem.

[268] Landes, *supra* note 39, at 22.

[269] Yonover, *supra* note 8, at 120.

[270] *Id.*

[271] *Id.* at 122.

[272] Pell, *supra* note 263, at 53.

litigation.[273] The outcome of a particular case turns on the happenstance of where an artist lives and the case law that accompanies that jurisdiction.[274] Therefore, where a use might be considered fair in one artist's jurisdiction, it might be considered unfair in the jurisdiction where the source artist resides.[275] In contrast, the arbitral tribunal would establish a body of precedential awards that would provide *ex ante* guidance to artists who need clarification of whether a use is fair. The panel would refer to prior awards to ensure that their decisions are consistent.[276] Over time, the DRPVA will come to serve as an information center for artists. By reviewing past awards, potential claimants and respondents could determine whether a use is fair or a copyright infringement without even having to submit to arbitral review.

C. *UDRP as a Model*

1. *Registration and Submitting Disputes and Responses*

Agreement to the DRPVA would include agreement to participate in binding arbitral proceedings if any fair use disputes were to arise.[277] Under the DRPVA, the complainant would be the owner of the registered copyright and the respondent would be the secondary user.[278] Like in the UDRP, copyright owners would have to meet a number of criteria before they could file a complaint with DRPVA.[279] First, the art registered by the copyright owner must be "identical or confusingly similar" to the secondary artist's work.[280] Second, the secondary artist must not have a registered copyright in

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[273] *Id.*

[274] *Id.* at 44.

[275] *Id.* at 44–45.

[276] WIPO, *supra* note 9, at 11.

[277] Barker, *supra* note 217, at 487. At the end of his article discussing the role of ADR in repatriation lawsuits involving Nazi looted artwork, Barker suggests that "[i]t may be possible to establish a 'policy' for art cultural property disputes which, like the ICANN policy, incorporates a general agreement as to the appropriate legal framework under which any proposed arbitration system might operate." *Id.*

[278] This would be different from the UDRP process. Under that process, the holder of the domain name is the respondent, rather than the complainant as in the DRPVA. *See* WIPO, *supra* note 9, at 9.

[279] *Id.* at 7.

[280] *Id.*

their work.[281] Third, the copyright owner must show that the secondary use infringes their copyright and the fair use defense does not apply.[282] For example, a secondary work that is a direct copy and has not transformed the original work would violate this provision.

Once establishing the three criteria, copyright owners could submit disputes surrounding an alleged unfair use to the panel.[283] The complainant would submit their complaint to the dispute resolution provider electronically and in hard copy.[284] The respondent would then have twenty days to respond to the complaint in the same manner.[285] Going forward, the single-member or three-member panel of arbitrators would be selected from a large pool based upon their expertise in the areas of fair use and the visual arts.[286] There are many intricacies and quirks particular to the industry, so specialists with knowledge of the norms in the art field are necessary for an equitable decision.[287] The appointment of experts allows both parties to feel comfortable that the panel has the ability and knowledge to make a just award.[288] The arbitrators would be updated daily on new decisions so as to ensure consistency amongst awards.[289]

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[281] *Id.* If they already have a registered copyright this would indicate that the copyright office determined that their work was a new expression worthy of protection and therefore the basis for a dispute would be moot.

[282] *Id.*

[283] WIPO, *supra* note 9, at 7.

[284] DAVID LINDSAY, INTERNATIONAL DOMAIN NAME LAW: ICANN AND THE UDRP 135 (2007).

[285] WIPO, *supra* note 9, at 8.

[286] *Id.* at 11.

[287] Sorkin, *supra* note 224, at 38.

[288] Keim, *supra* note 265, at 308. Keim notes: "arbitration is well suited to disputes in which the parties need an expert opinion . . . If such a case went to trial, each side would present experts to testify . . . and the court, which may have no expertise, would decide the issue." *Id.* (quoting S. Sorton Jones, *International Arbitration*, 8 HASTINGS INT'L & COMP. L. REV. 213, 214 (1985)).

[289] WIPO, *supra* note 9, at 11; *see also* LINDSAY, *supra* note 284, at 131. Lindsay notes:

> [B]asic principles of fairness, requiring that 'like cases should be decided alike', mean that a degree of consistency is highly desirable in UDRP decision-making. Moreover, referring to earlier decisions dealing with similar facts necessarily improves the efficiency of decision-making by removing the need for panelists [*sic*] to 're-invent the wheel' for each new dispute.

Id.

2. *Awards and Damages*

The panel would review the complaint and response, and submit a decision within fourteen days of panel appointment.[290] The parties would be notified within three days of the award and the award would be effective ten days after the decision is submitted.[291] If the panel decided against fair use, the respondent would be obliged to pay a set amount of statutory damages pursuant to 17 U.S.C. § 504(c),[292] Statutory Damages for Copyright Infringement.[293] As enumerated in this section of the Copyright Act, the panel may increase the award of statutory damages if the respondent's infringement was willful.[294] The panel may also reduce the damages considerably if they find that the infringer was not aware that their use constituted a copyright infringement.[295] The payment of damages by the infringer is an appropriate response because allowing the unauthorized use to proceed, without compensating the copyright owner, would discourage artists from creating work that would be infringed without any repercussions.[296] Likewise, if the panel decides for fair use, the complainant would be obliged to pay a set amount of statutory damages following a similar framework including distinguishing the damages based upon willfulness.[297]

3. *Judicial Appeals*

Similar to the UDRP, there would be a right to appeal to the courts, however, it will be limited to appealing the procedure, not the substance of

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290 WIPO, *supra* note 9, at 8.

291 *Id.* at 14.

292 17 U.S.C. § 504(c) (1976).

293 Nimmer, *supra* note 246, at 21; *see also* CAPPER, *supra* note 248, at 114 (noting that "[a]n order for the payment of money by one party to another is the most common remedy found in awards. The payment may represent compensation for losses suffered . . . ").

294 17 U.S.C. § 504(c)(2) (1976).

295 *Id.*

296 Cotter, *supra* note 22, at 1293–94. The award of statutory damages would not follow the UDRP procedure. The difference is attributed to the subject matter of the two acts. Statutory damages are a more appropriate remedy for disputes involving art than they are for domain name disputes.

297 Nimmer, *supra* note 246, at 21.

the decision.[298] This is the method that is utilized by the movie and television industries.[299] The court in *Ferguson v. Writers Guild of America* stated:

> [The] limited scope of review is similar to that employed in judicial review of more traditional arbitrations. There the court does not review the merits of the arbitrators' award; it examines only whether the parties in fact agreed to submit their controversy to arbitration, whether the procedures employed deprived the objecting party of a fair opportunity to be heard, and whether the arbitrators exceeded their powers.[300]

The DRPVA would utilize a similar method where a party could appeal to courts, but only for a procedural review. The substance of the arbitral award would not be an issue for the courts. Similar to the movie and television industries, disputes over the fair use of fine art would be nonjusticiable. Instead, the panel of experts would be able to handle the disputes "more skillfully, more expeditiously, and more economically . . . than courts."[301] Courts would defer to the decision of the arbitral panel because of its "expertise in the interpretation and application of"[302] the fair use factors to fine art.

V. CONCLUSION

Judicial application of the fair use doctrine as it applies to visual arts, particularly appropriation art, has not provided consistent case law usable by artists. Part of the reason for the inconsistency is a lack of understanding and application of the history of art to the analysis of copyright infringement and the fair use defense. This disconnect between copyright law and art norms can be bridged by the establishment of an arbitral procedure that would enlist decisionmakers with expertise in the visual arts. Using the UDRP as a model for the visual arts, the fair use doctrine as it applies to art would become consistent, transparent, and easy for potential users to apply.

The standards established by the arbitral panel would be sensitive to the intricacies and particulars of the art industry. The history of the creation of art, rather than the courts, should determine when an artist has successfully

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[298] See note 256 *supra* for the discussion of how the Writers Guild uses a similar process.

[299] Ferguson v. Writers Guild of America, West, Inc., 277 Cal. Rptr. 450 (Cal. Ct. App. 1991).

[300] *Id.* at 1389.

[301] *Id.*

[302] *Id.* at 1390.

created an original work of art. An arbitral panel would recognize and protect the reality that appropriation is often an element of the artistic process. A fair use arbitral panel for the visual arts would be best suited to work in tandem with copyright law to provide fair use guidance and to protect artists' exclusive rights in their copyrighted work, while at the same time promoting and encouraging the progress of the useful arts.